

Borissov's Latest Plan to Avoid True Reforms

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The [first country reports](#) under the new Rule of Law mechanism have attracted diverse commentaries by leading experts. While the European Commission has emphasized on multiple occasions that this new mechanism is a preventative tool, Prof. Daniel Kelemen [has compared](#) it to “installing a fire alarm when the building is already ablaze”, considering the consistent rule of law crises in the EU. Prof. Petra Bárd [has identified](#) numerous structural and methodological issues in the reports and has concluded that EU institutions need to make better use of the existing tools aimed at responding to violations of EU law.

Prof. Alina Mungiu-Pippidi has not spared [criticism](#) regarding the gaps and biases in the reports and she has raised an important question about Bulgaria — namely, why the country's rule of law report does not analyze why Bulgaria appears problematic again considering the Commission recommended that the Cooperation and Verification Mechanism (CVM) be lifted for Bulgaria last year.

Indeed, the Commission's silence about CVM in Bulgaria's rule of law report under the new mechanism appears suspicious, but this is by far not the only issue regarding the interplay between the CVM and the new mechanism. In fact, all bad habits that Bulgaria and the Commission developed under the CVM have been transferred onto the new Rule of Law mechanism. Even worse, Borissov's government is attempting to use the 2020 country report to deliver yet another blow to Bulgaria's rule of law by putting forward an [action plan](#) which allegedly addresses the Commission's concerns. Moreover, a shocking proposal that became public on 3 December 2020 revealed plans for a reform that would essentially allow the General Prosecutor to choose who will investigate him. This endeavor can only be deemed “[legal hooliganism](#)”.

Some Awkward Prehistory

Bulgaria and Romania are the only two EU members subject to the [CVM](#). As they did not fulfill all accession criteria at the time of joining the EU in 2007, the Commission put them under monitoring in the areas of rule of law and corruption in order to help them catch up through dialogue and recommendations. In a forthcoming academic article (“Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism”, EPL 2020, Vol. 26, Issue 3), I showcase how Bulgaria's rule of law severely deteriorated despite the CVM. The reasons for this are multiple. On the one hand, the Commission was lenient regarding long-standing challenges to Bulgaria's rule of law within the scope of monitoring, such as the excessive, uncontrollable powers of the Prosecutor's Office and the politization of the Supreme Judicial

Council. On the other hand, it verified reforms as progress, which in reality either preserved the existing structural problems or further undermined the rule of law.

I have also vehemently criticized the [Commission's 2018 CVM report](#), which declared three of Bulgaria's benchmarks provisionally closed (judicial independence, legal framework and organized crime), and the [2019 CVM report](#), which recommended that the CVM be lifted for Bulgaria. The Commission's conclusions in both reports did not match the reality on the ground.

The [mass protests](#) against Boyko Borissov's government and General Prosecutor Ivan Geshev, which erupted in July 2020 and are still taking place, exposed Bulgaria's rule of law decay to an international audience, but the process certainly does not appear to have started after the latest 2019 CVM report. Even further, while the European Parliament took an interest in this unfortunate state of affairs and adopted [a highly critical resolution](#) on Bulgaria's rule of law on 8 October 2020, the Commission remained stubborn and refused to fall on its back by assuming responsibility for its actions and omissions which contributed to Bulgaria's rule of law decline. This was particularly visible in [a highly controversial hearing](#) of Commissioner Vera Jourova before the LIBE Committee of the European Parliament during which it became clear that the Commission not only maintained its conclusions under the CVM, but also planned to sweep the mechanism under the carpet altogether. And so it did! We have not yet seen a 2020 CVM report.

A Biased Rule of Law Report

In this light, [Bulgaria's rule of law report](#) under the new mechanism is interesting because it appears like a combination of the CVM and the new methodology, with the drawback that the Commission has inherited its bad habits from the prior exercise. Moreover, the Commission has avoided a much-needed explanation about its prior omissions.

A rather partial picture

It is rather odd that Bulgaria's rule of law report has misrepresented the purpose of the mass protests in Bulgaria. This is surely a bad habit inherited from the CVM where the Commission deliberately avoided mentioning information which compromised Boyko Borissov and the Prosecutor's Office. [In the words of the Commission](#), the protests show "discontent in society with the lack of progress in effectively fighting corruption". However, these protests have two very clear addressees: the alleged corruption of the government of Boyko Borissov and the corruption of the Prosecutor's Office, especially General Prosecutor Ivan Geshev. Moreover, while mentioning less important scandals such as "ApartmentGate", the Commission has avoided referring to any of the major [scandals](#) implicating Borissov and Geshev, which shook Bulgaria this year, including the [raid against Bulgaria's Presidency](#) which triggered the mass protests.

A second bad habit inherited from the CVM is that the Commission takes words by Bulgarian institutions at face value. Particularly striking is the Commission's

empathy towards the Prosecutor's Office which has complained from lack of "financial resources" which allegedly hamper its work. Bulgaria's Prosecutor's Office is notorious for its unwise spending which has raised many controversies. Only in 2020, citizens learned that [millions had been poured](#) into the development of a police force attached to the Prosecutor's Office, which is highly non-transparent and which has an unclear constitutional basis. The President of the Supreme Court Lozan Panov has [overtly called](#) it a "paramilitary structure". It was with this department that the Prosecutor's Office raided Bulgaria's Presidency in 2020, nonetheless.

A white-washed Commission

It is surely odd that the Commission repeated its mantra from the CVM that "a solid track record of final convictions in high-level corruption cases remain[ed] to be established", while forgetting that in order for these to materialize and to have legal value, there needs to be an objective investigation and a fair trial in which fundamental rights are respected by an independent judiciary.

None of the serious allegations against Borissov, his ministers and Ivan Geshev can be investigated objectively because of the current state of affairs to which the Commission has contributed via the CVM. In this rule of law report on Bulgaria we learn that the "lack of a possibility for an effective criminal investigation concerning the Prosecutor General and his or her deputies is a long standing issue" in Bulgaria. However, what did the Commission do to help resolve this problem in the 13 years of monitoring under the CVM? In a [prior article](#), I have explained how, unlike the Commission, which has remained relatively nonchalant regarding this problem in the CVM reports, the Council of Europe has engaged in a true cat-and-mouse game with Bulgaria in a genuine attempt to make it comply with [Kolevi v Bulgaria](#).

Moreover, Borissov and his ministers cannot be objectively investigated either since the Prosecutor's Office not only has a vertical, Soviet structure where all decisions depend on the General Prosecutor, but also that person is elected by a heavily politicized Supreme Judicial Council (SJC). This is a problem to which the Commission contributed via the CVM because it recognized a highly controversial reform of the institution as progress in the [2016 CVM report](#) despite [protests](#) by the judiciary. In fact, in the current rule of law report, the Commission continues to insist that this reform constituted progress.

Unlike this year's highly critical [resolution](#) on Bulgaria by the European Parliament which mentions the government's assault against fundamental rights, the Commission has completely turned a blind eye to this matter in Bulgaria's rule of law report. But how could it open its eyes since it recognized crackdowns on fundamental rights as progress in the [CVM reports](#) in prior years? While it is commendable that the Commission recognizes, in the current report, that "the risk to judicial independence is evidenced by the number of judges subject to attacks", it is quite surprising that the Commission closed the judicial independence benchmark in the CVM in 2018 when, at the time, there was even more evidence of such attacks, including [targeted harassment](#) of the highest-ranking judges?

Borissov's Latest Trickery

Borissov's government has inherited some bad habits from the CVM as well. While the new rule of law mechanism does not require EU members to publicly address the Commission's concerns in the rule of law report, Borissov's government has engaged in an exercise which unwittingly reveals what happened in the CVM kitchen. It has published an [action plan](#) in which it explains how it will address the Commission's concerns and observations in Bulgaria's rule of law report.

While those unfamiliar with the Bulgarian context may find this commendable, those following Bulgaria's rule of law decline immediately know that Borissov's government will pretend it is concerned about the Commission's findings only to further undermine Bulgaria's rule of law. Established attorney and government critic Georgi Atanassov has already [qualified](#) the action plan as an example of "complete lack of legal adequacy" and has concluded that its purpose was to present legal illiteracy and legal nihilism in a shape acceptable for Brussels. Indeed, there is a lot of verbiage, including many meaningless proposals, such as an initiative to introduce high school and university students to the work of the judiciary. However, there are also many proposals which either constitute assaults against Bulgaria's Constitution or attempts to pretend that work is taking place regarding long-standing challenges of Bulgaria's justice system.

Atanassov himself is particularly concerned that in blatant violation of the principle of separation of powers, the Council of Ministers has distributed tasks to institutions, which are part of the judiciary, and has given them deadlines to write reports and to propose legislative changes even though they do not have the right to legal initiative. The Prosecutor's Office, for instance, has been asked to put forward proposals for amendments of Bulgaria's Criminal Code and Code of Criminal Procedure. Atanassov is also rightfully scandalized by the fact that the Prosecutor's Office has been asked to analyze and draw conclusions about corruption cases, including about efficiency and organization. In essence, this means it has been asked to evaluate the work of judges — for critics, it is quite transparent this implies the courts should be blamed for the lack of results in fighting corruption, a pleaser for Borissov's and Geshev's ears.

Meanwhile, not only the Council of Ministers is increasing the already excessive powers of the Prosecutor's Office but is also trying desperately to avoid introducing checks and balances in the institution. In the action plan, it has pompously announced that it will put forward a proposal for reform before Parliament and will ask it to submit it for an opinion before the Venice Commission. Sadly, this game has been played many times before: Borissov's governments have submitted several questionable proposals for reform of the Prosecutor's Office before the Venice Commission in the past. Even more shockingly, the proposal, which became public on [3 December 2020](#), can only be deemed an example of legal hooliganism because, as journalist Krasen Nikolov [has observed](#): the General Prosecutor, in essence, will choose who will investigate him.

Is There Hope?

The question that remains is whether the Commission will turn a blind eye to Borissov's latest trickery. I have analyzed the pitfalls of the CVM which I consider a failure. I have also witnessed how the Commission plays along with Borissov on other matters. Even though Borissov's 2020 proposal for a [new Constitution](#) was deemed incompetent by key experts in Bulgarian constitutional law, the Commission still recommended that Borissov essentially waste the time of the Venice Commission by submitting it for an opinion. The [opinion](#), in the end, was highly critical, which made Borissov take a step back and abandon the ideas for a grand national assembly, but Borissov achieved his goal of buying time and delaying resignation — the very purpose of his constitutional proposal. As a result, I do not have much hope. The rule of law mechanism seems like an “Eeny, Meeny, Miny Moe” exercise in which Bulgaria has been counted out for proper rule of law monitoring.

